

STATE OF MICHIGAN
COURT OF APPEALS

JOHN ARTHUR HARRIS, JR.,

Plaintiff-Appellant,

v

FLOYD H. FARMER, JR.,

Defendant-Appellee.

UNPUBLISHED

February 4, 2010

No. 288968

Ottawa Circuit Court

LC No. 07-060234-CZ

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Plaintiff, acting in propria persona, appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and dismissing plaintiff's legal malpractice action. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant served as plaintiff's court-appointed attorney in a criminal proceeding in which plaintiff was charged with identity theft, MCL 445.65; MCL 445.69. The prosecution alleged that plaintiff used or attempted to use another person's social security number¹ to obtain employment. Plaintiff was convicted as charged. On appeal to this Court, defendant's claim of ineffective assistance of counsel was rejected and his conviction was affirmed. *People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2009 (Docket No. 283670).

Plaintiff filed an action against defendant for legal malpractice, alleging that defendant negligently failed to properly cross-examine a witness, failed to object to evidence proffered by the prosecution, and failed to present evidence regarding plaintiff's employment. Defendant moved for summary disposition, which the trial court granted pursuant to MCR 2.116(C)(8).

We review a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the

¹ The social security number, along with other identifying information, was in the complainant's purse, which had been stolen from a bus stop.

pleadings alone to determine whether the plaintiff has stated a claim upon which relief can be granted.” *Morden v Grand Traverse Co*, 275 Mich App 325, 331; 738 NW2d 278 (2007); MCR 2.116(G)(5).

A plaintiff seeking to bring a legal malpractice claim must establish the following elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). To establish proximate cause, the plaintiff must show that the defendant’s action was a cause in fact of the claimed injury. *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The plaintiff must prove cause in fact by reasonable inference and not just by mere speculation or impermissible conjecture. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 615; 563 NW2d 693 (1997).

An attorney is obligated to use reasonable skill, care, discretion, and judgment in representing a client and to act as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances. *Simko*, 448 Mich at 656. Although an attorney has the duty to fashion a strategy so that it is consistent with prevailing Michigan law, he does not have a duty to ensure or guarantee the most favorable outcome possible. *Id.*

Plaintiff asserts that defendant was negligent in failing to subpoena or present witnesses or documents to establish that plaintiff had obtained employment through Child Support Service’s “Noncustodial Parent Program” and that Child Support Services was therefore aware of his employment, contrary to the prosecution’s suggestion that plaintiff provided an invalid social security number to avoid paying child support.

We note that decisions made involving trial tactics or litigation strategy are generally not subject to attack in an action for legal malpractice. See, e.g., *Mitchell v Dougherty*, 249 Mich App 668, 679; 644 NW2d 391 (2002). “[M]ere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence.” *Simko*, 448 Mich at 658. Accordingly, where a plaintiff’s allegations cannot support a breach of duty because they are based on mere errors of professional judgment and not breaches of reasonable care, summary disposition is appropriate. *Id.* at 659.

As this Court noted in plaintiff’s appeal in the underlying criminal case, there was no evidence demonstrating the existence of any such documents. Furthermore, and significantly, defendant did present evidence, in the form of plaintiff’s testimony, that Child Support Services was aware of his employment. Defendant also argued in closing that plaintiff could not avoid paying child support by using a different social security number. See *Harris, supra*, slip op p 3. Therefore, plaintiff cannot establish that defendant’s action was a cause in fact of the claimed injury, i.e., that the result of the proceeding would have been different had such evidence been submitted. *Manzo*, 261 Mich App at 712. The trial court did not err in granting summary disposition in favor of defendant.²

² We additionally note that summary disposition would have been appropriately granted on the
(continued...)

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray

(...continued)

basis of collateral estoppel. A party who has unsuccessfully litigated a claim of ineffective assistance in criminal proceedings is precluded from challenging the same representation in a civil malpractice action. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 347; 657 NW2d 759 (2002); *Barrow v Pritchard*, 235 Mich App 478, 484-485; 597 NW2d 853 (1999). Plaintiff in the instant civil action seeks to relitigate the same assertions of attorney error that were raised and rejected in his criminal appeal.